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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND
NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents have wholly failed to justify the extraordinary injunction ordered by the court of appeals that bars implementation of Executive Order No. 12,807, the President's response to a life-threatening migrant crisis on the high seas. If allowed to stand, that injunction would directly interfere with the operation of military vessels on the high seas under the direction of the President as the Commander-in-Chief, and upset the delicate balance of rapidly changing diplomatic and other measures undertaken by the President to restore democratic rule in Haiti. As we explain in our opening brief, judicial review of the President's policy is precluded, injunctive relief is foreclosed by principles of equity, and respondents' challenge under 8 U.S.C. 1253(h) is barred under principles of collateral estoppel by virtue of the Eleventh Circuit's decision in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, cert. denied, 112 S. Ct. 1245 (1992). But if the Court reaches the merits, respondents' claim under Section 1253(h) should be rejected, because that Section has no application to aliens who are outside the borders of the United States.

I. The respondents in this case—aliens who are outside the United States—have no basis for seeking an injunction from a U.S. court to prevent the President from implementing a policy of interdiction and repatriation of Haitian migrants on the high seas.¹ As we have demonstrated in our opening brief (at 13-18), that conclusion is compelled by “the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

Congress has expressly provided in the INA for judicial review of refugee and other matters involving aliens who are in the United States and subject to deportation or exclusion proceedings. 8 U.S.C. 1105a(a) and (b). By contrast, Congress has omitted any provision for judicial review of such matters at the behest of aliens outside the United States. The structure of the INA therefore impliedly forecloses APA review for those aliens. Indeed, as we have explained (Gov’t Br. 15-17), when Congress enacted 8 U.S.C. 1105a(b) in 1961, it did so for the specific purpose of precluding APA suits to challenge exclusion decisions; it instead limited aliens who are at the border seeking admission to the United States to whatever review may be available in habeas corpus. It follows *a fortiori* that the respondents in this case—who have “never presented [themselves] at the borders,” *Brownell v. Tom We Shung*, 352 U.S. 180, n.3 (1956)—cannot invoke the APA to challenge Executive actions under the immigration laws.² And because such aliens are not elig-

¹ Contrary to respondents’ suggestion (Br. 52 n.94), the preclusion of review applies to all their claims.

² Respondents err in contending (Br. 55) that when Congress enacted 8 U.S.C. 1105a in 1961, it merely “channeled judicial review of individual deportation and exclusion orders into particular modes.” Congress foreclosed *all* APA review in the exclusion process because “[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a ‘right’ to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant.” H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

ible for habeas corpus relief, *Johnson v. Eisentrager*, 339 U.S. 763, 771, 777-781, 790-791 (1950); compare *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990), judicial review is altogether barred.³

Respondents nevertheless contend that review is not precluded here because implementation of Executive Order No. 12,807 involves “governmental conduct towards aliens that arises wholly outside the deportation or exclusion process.” Resp. Br. 53. This argument stands the statutory scheme on its head. Judicial review is an ordinary culmination of the adjudicatory processes of deportation and exclusion, which are conducted within the United States and within the usual purview of our courts. Respondents’ suit is precluded because it does not arise in that setting, but instead seeks to halt an interdiction and repatriation program on the high seas, where any judicial role would be extraordinary. Nor are respondents helped by stressing (Br. 55) that they “sue here not to gain entry, but to prevent their forced return to Haiti”; that fact further attenuates respondents’ personal nexus to this country and

³ Respondents assert (Br. 50) that “[p]articularly in the immigration context, courts have permitted aliens located outside of the United States to obtain review of the legality of U.S. government actions adversely affecting them.” The cases they cite for that proposition, however, offer no support for this suit. See Resp. Br. 50 n.88. In *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977), and *Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984), the courts simply allowed aliens who were once in the United States and who had been the subject of deportation proceedings to continue to challenge their deportations even though they had been deported while their cases were pending. In *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979), the court allowed a class of visa applicants, including aliens residing abroad, to challenge an INS policy. However, the decision rested on the fact that the class also included aliens residing in the United States, and the government conceded, for purposes of the case, that it would accord the same treatment to non-resident class members as it accorded to residents. *Id.* at 984. This Court’s decisions in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and *Jean v. Nelson*, 472 U.S. 846 (1985), also cited by respondents (Br. 51 n.92, 52 & n.93, 53 n.95, 56), involved aliens in the United States. Still other decisions cited by respondents (Br. 50 n.87) did not involve immigration issues at all.

its laws, and thereby renders their invocation of the injunctive powers of U.S. courts all the more inappropriate.

Finally, the breadth and discretionary nature of the statutory authority invoked by the President in this case—which permits the President to restrict entry of any aliens or class of aliens “[w]hensoever the President finds” that their entry “would be detrimental to the interests of the United States,” 8 U.S.C. 1182(f)—confirm that the INA contemplates no role for the courts here. See *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992); *Webster v. Doe*, 486 U.S. 592, 600 (1988); Gov’t Br. 17-18. Respondents denigrate these considerations as ones of “mere[] executive convenience” (Br. 55), but they are far more than that. The close connection between the interdiction program and the larger effort to resolve the international crisis concerning Haiti vividly illustrates how judicial interference with the President’s ability to speak with one voice in foreign affairs can seriously prejudice the national interest. At the very least, if judicial review is not altogether precluded by the INA, established equitable principles bar injunctive relief and require dismissal of this suit without reaching the merits. See Gov’t Br. 55-57.

II. Adjudication of respondents’ claim under 8 U.S.C. 1253(h) also is barred by principles of collateral estoppel by virtue of the Eleventh Circuit’s decision in *HRC v. Baker*, which rejected a claim under Section 1253(h) in a suit brought on behalf of a class of plaintiffs that includes the Haitian plaintiffs in this case.

A. We have shown (Gov’t Br. 18-27) that the Second Circuit erred in declining to apply collateral estoppel on the grounds that the plaintiffs in this case are different from those in *HRC* because they challenge a different “Interdiction Program,” and that the May 1992 Executive Order constituted “an intervening change in the applicable legal context,” Pet. App. 12a. Respondents do not defend the latter rationale (see Resp. Br. 47), and we have already answered their brief attempt to defend the former (see Resp. Br. 43-44). See Gov’t Br. 19-21.

The interdiction program has remained in effect and unchanged since 1981. The 1992 Executive Order merely revised the procedures to be followed *after* an alien is interdicted, and therefore did not alter the identity of the class that challenged the adequacy of those procedures both before and after the Order was issued.

B. Respondents, however, make a further argument to avoid collateral estoppel. They contend that the class certified in *HRC* was limited to screened-out migrants; that the class certified by the district court in the present case is composed of migrants who were initially screened in under the screening policy in effect prior to May 24, 1992; and that the lack of identity between the two classes renders collateral estoppel inapplicable. See Resp. Br. 41-42. That argument is wholly without merit.

Respondents are incorrect in asserting (Br. 3) that “[t]he *HRC* class included only screened-out Haitians, i.e., persons who had been harmed by alleged inadequacies in the initial screening procedures.” In fact, the *HRC* class was composed of

all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard Cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

Pet. App. 46a (emphasis added). Thus, the class action in *HRC* was intended to gain relief for individuals who remained in Haiti at the time the suit was filed, but who might, in the future, leave that country by boat and be interdicted by U.S. officials.

At the outset of the instant case, respondents’ principal challenge was to the policy, announced by INS on February 29, 1992, of requiring those screened-in Haitians at the Guantanamo Bay Naval Base who were found to be medically excludable to undergo second interviews at Guantanamo. See Pet. 6 n.3. It was in this context that the district court certified a class of screened-in plaintiffs.

Respondents now present, on behalf of the *same* class of screened-in Haitians, a challenge to the intervening May 1992 Executive Order. The great majority of previously screened-in migrants were unaffected by the new Order, since the government continued to process Haitians interdicted prior to May 24 under the procedures in effect prior to that date. There are, however, three small groups of Haitians who were initially screened in but have since been repatriated. These include (1) medically excludable Haitians who were initially screened in but then subsequently found, following a second interview at Guantanamo, not to qualify for refugee status; (2) screened-in medically excludable Haitians who were repatriated after they refused to participate in their second interviews; and (3) screened-in migrants who were inadvertently returned to Haiti due to U.S. officials' mistaken belief that they had been screened out. Respondents' theory appears to be that at least some of these individuals are adversely affected by the May 1992 Executive Order because they intend to take to the seas again and expect to be repatriated without an interview, or are now deterred from doing so by the current policy of direct repatriation.

The problem with respondents' argument is that neither the injury they allege nor the illegality they assert has any connection to the prior screening. Their claim rests instead upon the prospect of *future* interdiction and repatriation: like the *HRC* plaintiffs, the gravamen of respondents' claim is that they wish to leave Haiti by boat but fear repatriation. Insofar as their challenge to the May 1992 Executive Order is concerned, the respondent Haitians therefore fall squarely within the class certified in *HRC*.⁴

⁴ Nor is there any basis for respondents' contention (Br. 43) that their interests "were not adequately represented by the screened-out named plaintiffs in *HRC*." The *HRC* plaintiffs invoked 8 U.S.C. 1253(h) in their challenge to the refugee determination procedures then in place. The *HRC* plaintiffs' statutory claim depended upon the proposition that Section 1253(h) forbids repa-

Thus, even those respondents who were actually screened in under the old Executive Order, and were subsequently returned to Haiti, cannot escape the preclusive effect of *HRC*. Respondents compound their error, however, by arguing that the class of screened-in plaintiffs certified by the district court here includes individuals who have never been screened, but who allegedly *would have been* screened in if the May 1992 Executive Order had not been issued. See Resp. Br. 42 & n.78. Under this reasoning, of course, the plaintiffs in *HRC* would also qualify as screened-in migrants, since the gravamen of their complaint was that they would have been screened in if more accurate procedures had been used. Respondents' effort to bring all *potential* "screen-ins" within the certified class in this case only underscores the futility of their attempt to assert a sharp dichotomy between screened-in and screened-out migrants, and thus to distinguish themselves from the class certified in *HRC*.

C. Finally, respondents contend that the Second Circuit correctly declined to apply collateral estoppel in order to permit the "percolation" of the pertinent legal issues

triage of refugees encountered on the high seas, and they forcefully advocated that position.

Respondents also argue (Br. 47 n.86) that "the Eleventh Circuit may reasonably have determined that [Section 1253(h)] was not directly implicated by petitioners' conduct [since] even if petitioners made some mistakes in screening, they were bringing to the U.S. anyone who demonstrated a 'credible' fear of persecution." Of course, the Eleventh Circuit *could* have decided *HRC* by holding that the screening procedures then in place were sufficient to fulfill whatever duties Section 1253(h) might impose. The court did not decide the case on that ground, however; it held instead that Section 1253(h) does not apply at all to aliens who are not "in the United States." Pet. App. 214a-216a; see Pet. App. 52a-61a (Walker, J., dissenting). In deciding whether the change effected by the May 24 Executive Order is "material" for purposes of collateral estoppel, this Court must focus on the reasoning *actually employed* by the Eleventh Circuit—not on whether there exists a hypothetical mode of analysis under which the presence or absence of screening procedures would take on dispositive significance. Compare *Montana v. United States*, 440 U.S. 147, 158-162 (1979).

through "multiple courts of appeals." Resp. Br. 46. The very purpose of issue preclusion, however, is to protect litigants "from the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. To suggest that the possibility of duplicative litigation and circuit conflict weighs *against* the application of collateral estoppel stands preclusion doctrine on its head. Respondents' reliance on *United States v. Mendoza*, 464 U.S. 154 (1984) (see Resp. Br. 46), is particularly misplaced. *Mendoza* rested on concerns unique to the United States government as litigator, see 464 U.S. at 159-163; and, in any event, even the United States is subject to *mutual* collateral estoppel. See *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984).⁵

⁵ Respondents urge that the Second Circuit's decision not to apply collateral estoppel should be reviewed deferentially; they rely on this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), for the proposition that "[c]ourts have 'broad discretion' to deny application of collateral estoppel." Resp. Br. 45. *Parklane Hosiery* stated only that federal trial courts possess broad discretion to determine whether *offensive* collateral estoppel should be applied. 439 U.S. at 331. It did not address the situation in which collateral estoppel is used *defensively*—the thrust of the Court's opinion was that the offensive use of collateral estoppel raises distinct concerns that make a case-specific analysis particularly appropriate—or suggest that *this* Court owes deference to the decision of a federal court of appeals. Since *Parklane Hosiery*, this Court has frequently resolved issues regarding the defensive use of collateral estoppel without suggesting that a deferential standard of review was required. See, e.g., *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880-882 (1984); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-363 (1984); *United States v. Stauffer Chemical Co.*, 464 U.S. at 169-174; *Montana v. United States*, 440 U.S. at 153-164. Respondents do not argue in this Court, and did not argue below, that the *district court's* disposition of the collateral estoppel issue should be reviewed under an abuse-of-discretion standard. Their reluctance is understandable, since the pertinent district court opinion (which held for the government on the merits) did not address the government's contention that respondents' challenge to the May 24 Executive Order is barred by collateral estoppel. See Pet. App. 165a-168a.

III. Even if respondents were able to overcome the formidable threshold obstacles to this suit, the complaint still must be dismissed because their claim fails on the merits: 8 U.S.C. 1253(h) simply was never intended to apply to aliens outside the United States, and Article 33 of the U.N. Convention cannot be invoked to extend its territorial scope.

A. *Section 1253(h)*. As we have explained in our opening brief (at 27), Section 1253(h) must be construed in light of the "longstanding principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed," "affirmative intention" by Congress to the contrary. *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (citations omitted). Respondents contend (Br. 33-36) that the presumption is inapplicable here because it operates only where Congress's intent is "unexpressed," while here Congress's intent is supposedly "unambiguous"; because the presumption should be inapplicable to the high seas; and because the INA is inherently international in scope. All of these points are insubstantial. Congress nowhere manifested any specific intent to apply Section 1253(h) extraterritorially; the Court has already held that the presumption applies on the high seas as well as in foreign countries (see *Arabian American Oil*, 111 S. Ct. at 1235; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)); and the general subjects to which the relevant parts of the INA are addressed (the admission of aliens into and the deportation and exclusion of aliens from the United States) in no way suggest that the INA was intended to regulate encounters between aliens and U.S. military and civilian operations outside our borders.

In addition, the usual presumption against extraterritorial application of an Act of Congress is strongly reinforced here by the principles that statutes not be construed to interfere with (a) the conduct of foreign policy (the delicate diplomatic endeavors to resolve the multifaceted international crisis concerning Haiti); (b) the

constitutional and statutory responsibilities of the President (his discretionary authority under other provisions of the INA itself, 8 U.S.C. 1182(f) and 1185(a)(1), to suspend entry of Haitian migrants, and his directives as Commander-in-Chief to Coast Guard vessels to guard the Nation's borders through the policy of interdiction and repatriation);⁶ or (c) a fundamental attribute of the Nation's sovereignty (the power to exclude aliens). See Gov't Br. 27-28. In this case, respondents have pointed to no "clear statement" in either the text or legislative history of Section 1253(h) of the sort that would be necessary to overcome the presumption against extraterritoriality, even if it were not reinforced here by these other considerations. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991).

1. *Statutory Text and Structure.* a. Neither the text of Section 1253(h) nor the structure of the INA suggests the world-wide scope respondents urge for that Section. Paragraph (1) of Section 1253(h) provides:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1253(h)(1) (Supp. II 1990). This language speaks only to the Attorney General, who ordinarily has custody of aliens—and therefore is in a position to "deport" or "return" them—only if the aliens are physically present in the United States. See 8 U.S.C. 1182(d)(5), 1222, 1225(b), 1252(a); *INS v. National Center for Immigrants' Rights*, 112 S. Ct. 551 (1991).

⁶ Respondents' suggestion (Br. 37 n.69) that the injunction below does not intrude upon the President's Commander-in-Chief powers because the Coast Guard has been placed in the Department of Transportation is frivolous. Under 14 U.S.C. 1, the Coast Guard "shall be a military service and a branch of the armed forces of the United States at all times."

There is, by contrast, no mention of the Coast Guard or any other agency that might encounter aliens beyond our borders. Thus, respondents' contention (Br. 13, 33) that Section 1253(h) "unambiguously" applies to the interdiction and repatriation program conducted by the Coast Guard on the high seas is answered by the Section's first three words. Moreover, the prohibition in Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. The Attorney General of course is required to make such a determination regarding an alien who is within the United States, because the alien cannot be removed from the country (by deportation or exclusion) without first having an opportunity for a hearing before the Attorney General. See 8 U.S.C. 1226, 1252. But the INA does not require the Attorney General to make such a determination regarding each of the countless aliens who might be encountered each year by the thousands of other U.S. personnel stationed beyond our borders. See Gov't Br. 30-32. For these reasons, the most natural reading of paragraph (1) of Section 1253(h), even when read in isolation, is that it prohibits the Attorney General from deporting or returning an alien *from* the United States (where he has responsibility for aliens) "to a country" in which the alien would be threatened with persecution.

This interpretation is reinforced by the exceptions in paragraph (2) of Section 1253(h), which contain the Section's only "geographic reference[s]," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 (1992) (Stevens, J., concurring in the judgment). All four references are to the "United States," giving it a decidedly domestic focus.

b. Respondents' attempts to shift this focus abroad are unavailing. They first invoke (Br. 12) the Second Circuit's reliance on paragraph (1)'s reference to "any alien." See Pet. App. 16a, 17a, 21a, 22a. As we have explained (Gov't Br. 32), however, such general language is wholly insufficient to overcome the presumption against extraterritoriality. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 282, 287-288 (1949); *Defenders of Wildlife*,

112 S. Ct. at 2150 n.4 (Stevens, J., concurring in the judgment). In Section 1253(h), "any alien" means any alien *in the United States* who is subject to deportation or exclusion proceedings, and who therefore is subject to being "deport[ed] or return[ed]" by the Attorney General to another country.

Respondents stress (Br. 13) that "Congress specified that the Attorney General may not return—i.e., send back—an alien 'to a country' where she would face persecution, without specifying where an alien may not be returned *from*—i.e., within or without the United States." If respondents are correct on the latter point, then their claim under Section 1253(h) must fail for that reason alone, since only an express statement affirmatively imposing obligations and conferring rights outside the United States would suffice to extend Section 1253(h)'s coverage beyond our borders. But in addition, as explained above, the text of Section 1253(h) in fact contains numerous affirmative indicia that it applies only to actions the Attorney General takes with respect to aliens who are physically present within the United States.⁷

Although respondents concede that the exceptions in paragraph (2) of Section 1253(h) "do contain genuine limits" by virtue of their repeated references to the "United States," they insist that paragraph (1) is not so limited because it does not expressly refer to the "United States." See Resp. Br. 19. Respondents ignore the fact that paragraphs (1) and (2) are part of a

⁷ Respondents rely (Br. 13 n.17) on the provision in 14 U.S.C. 89(b) that "officers of the Coast Guard insofar as they are engaged * * * in enforcing any law of the United States shall * * * be deemed to be acting as agents of the particular executive department * * * charged with the administration of the particular law" and "be subject to all rules and regulations promulgated by such department * * * with respect to the enforcement of that law." In this case, however, the Coast Guard is acting pursuant to authority delegated directly to it by the President pursuant to 8 U.S.C. 1182(f) and 1185(a)(1); the Coast Guard is not acting as the agent of the Attorney General. See Exec. Order No. 12,807, § 2 (J.A. 377-378). In any event, 14 U.S.C. 89(b) cannot extend Section 1253(h) to locations where it would otherwise not apply.

single Section that both states a general prohibition and carves out exceptions to that prohibition. The significance of the express geographical references in the exceptions is that they *presuppose* that the alien who would otherwise benefit from paragraph (1) has already "arriv[ed] * * * in the United States." 8 U.S.C. 1253(h)(2)(C). It is only such aliens who the Attorney General would "deport or return" to another country.

c. The domestic focus of Section 1253(h) is further confirmed by the statutory context in which it appears—specifically, as part of 8 U.S.C. 1251-1253, which prescribe the standards and procedures for deporting aliens who are "in the United States." 8 U.S.C. 1251(a) (Supp. II 1990), 1253(a); see Gov't Br. 35-36. Respondents concede (Br. 18) that "Congress originally placed [Section 1253(h)] in Part V of the INA" because at the time "it governed *only* withholding of deportation, and thus applied only to those aliens located within the United States who were subject to deportation." In respondents' view, however, after Congress amended Section 1253(h) in 1980, "this location was a historical relic of no significance." "Indeed," respondents continue, "if [Section 1253(h)'s] location in Part V were meaningful, its applicability would be limited solely to deportation proceedings and could not act, as it undeniably does, to protect aliens in exclusion proceedings under Part IV." See Resp. Br. 18.

As we explain below, however, the textual changes made by the 1980 amendments did no more than make relief under Section 1253(h) available to aliens in exclusion as well as deportation proceedings. Although Congress might have accomplished the same result by both amending Section 1253(h) and adding a new provision to Part IV of the INA (which prescribes procedures for exclusion proceedings), it reasonably chose to ensure uniformity as between exclusion and deportation proceedings in a more simplified manner by addressing both in a single amendment to the existing Section 1253(h). There was nothing anomalous or incompatible about that approach. Aliens in exclusion proceedings share certain

essential characteristics with those who are in deportation proceedings governed by Part V of the INA: both are physically present in the United States, and both are the subject of formal proceedings through which the Attorney General proposes to remove them from the United States. Those characteristics are necessarily associated with the location of Section 1253(h) in Part V of the INA. By contrast, respondents and other aliens outside the United States possess neither of those characteristics, and it accordingly would have been anomalous and incompatible with the structure of the INA to afford them relief under provisions of the Act that address the removal of aliens from within the United States. Contrary to respondents' contention, then, the location of Section 1253(h) continues to be quite "meaningful" and is not an "historical relic."

2. *Statutory History.* Because they are unable to find any specific support for their position in the text and structure of the INA, respondents rest their argument almost entirely on a comparison of the language of Section 1253(h) before and after it was amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107. See Resp. Br. 11-12, 18-19, 23-25. Significantly, however, they do not cite a shred of evidence to support the proposition that Congress actually intended the 1980 amendments to have the effect of rendering Section 1253(h) world-wide in its scope.

In *Leng May Ma v. Barber*, 357 U.S. 185 (1958), this Court held that the relief of withholding of deportation under Section 1253(h) was not available to an alien who had been apprehended at the border and paroled into the United States, and who was therefore subject to exclusion rather than deportation proceedings. The Court concluded that such aliens were not "within the United States" in the "technical sense" in which that phrase was used in the version of Section 1253(h) then in effect. *INS v. Stanisic*, 395 U.S. 62, 71 (1969); see *Leng May Ma*, 357 U.S. at 188, 190; see also *INS v. Stevic*, 467 U.S. 407, 415 (1984). The Court also explained in *Leng May Ma* that our immigration laws have long distinguished between those aliens who have come to our shores seeking

admission and those who have entered and are within the United States. That distinction, the Court explained, was "carefully preserved" in the INA, which subjects the former to "exclusion proceedings" under Part IV of the Act, 8 U.S.C. 1221-1230, and subjects the latter to what the Court termed "expulsion" proceedings (commonly referred to as "deportation proceedings") under Part V, 8 U.S.C. 1251-1260. 357 U.S. at 187. The Court observed in this regard that although the word "deportation" also is used in Part IV "to refer to the return of excluded aliens from the country," "its use there reflects none of the technical gloss accompanying its use as a word of art in [Part V]." *Ibid.* (emphasis added). Thus, the Court held, Section 1253(h)'s provision for withholding of "deportation" did not permit withholding of the return of an alien in exclusion proceedings. See 357 U.S. at 189-190.⁸ In light of *Leng May Ma*, the obvious import of Congress's amendment of Section 1253(h) in 1980 to delete "within the United States" and add "return" was to extend eligibility for "withholding" relief to aliens in exclusion as well as deportation proceedings.

Respondents' only reply is that *Leng May Ma* itself is not mentioned in the legislative history. See Resp. Br. 24-25. The failure to mention *Leng May Ma* by name is irrelevant, however, because the legislative history shows that Congress's purpose was to eliminate the very distinction between deportation and exclusion proceedings that was recognized in *Leng May Ma*. The House Report states that the amendments revise Section 1253(h), "relating to withholding of deportation, to require (with some exceptions) the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion[,] as well as deportation, proceedings." H.R. Rep. No. 608, 96th Cong., 1st Sess. 30 (1979). The Senate

⁸ *Leng May Ma* itself therefore forecloses respondents' argument that "return" in Section 1253(h) necessarily refers to aliens outside the United States because "deport" in that Section encompasses excluded aliens by virtue of the use of "deport" in Part IV of the INA in connection with exclusion proceedings. See Resp. Br. 19 (citing 8 U.S.C. 1225(c), 1227(a)(1)).

Report makes the same point in virtually identical language. S. Rep. No. 256, 96th Cong., 1st Sess. 17 (1979). And the revisions were explained in the same way by the Commissioner of INS when they were proposed in 1977,⁹ and again in 1979 by witnesses for Amnesty International, U.S.A., who characterized them as only "modest" changes.¹⁰ There is, by contrast, absolutely no support in the legislative history for respondents' notion that the 1980 amendments were intended to have the far from "modest" effect of imposing duties on United States officials—and corresponding rights on aliens—throughout the world.

Respondents note (Br. 25 n.42) that the bills to which the Commissioner of INS and Amnesty International addressed their remarks would have continued to make withholding of deportation discretionary with the Attorney General, while the bill ultimately enacted made withholding mandatory so as to conform fully with Article 33. This attempt to explain away the testimony is completely unavailing. Although the versions of Section 1253(h) under consideration at the time of the testimony differed in certain respects from that finally enacted, they contained the particular revisions on which respondents rest their entire case—namely, the deletion of "within the United States" and the addition of "return." See H.R. 3056, 95th Cong., 1st Sess. § 5(e) (1977 *Hearings* at 12); H.R. 2816, 96th Cong., 1st Sess.

⁹ See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 81, 83, 84, 94 (1977) [1977 *Hearings*].

¹⁰ See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 169 (1979) [1979 *Hearings*]. Although Amnesty International, U.S.A. has filed an amicus brief in support of respondents in this Court, it makes no mention of—and thus apparently has no plausible argument for why the Court should ignore—its contrary interpretation of the relevant statutory text when Section 1253(h) was amended.

§ 203(e) (1979 *Hearings* at 14-15).¹¹ Moreover, the Conference Report approved by Congress at the conclusion of the legislative process, like the House and Senate Reports, refers to Section 1253(h) as providing for withholding of "deportation"¹²—a description totally at odds with respondents' notion that Section 1253(h) applies to aliens who are beyond our borders and therefore beyond the reach of both deportation and exclusion proceedings.¹³

¹¹ Respondents fault us for not "offer[ing] any explanation why it took Congress twenty-two years to repair the statute to 'correct' *Leng May Ma*, or why Congress did not simply substitute other limiting language for 'within the United States' rather than removing the geographic limit altogether." Resp. Br. 25. Respondents presumably do not mean to argue that the result in *Leng May Ma* was somehow "corrected" prior to the 1980 amendments, since that decision was followed during the intervening years (see Pet. Br. 52 n.41; note 13, *infra*) and Congress did not revise the statutory language on which the Court relied in *Leng May Ma* until 1980. Respondents' argument must instead be that the 1980 amendments both "corrected" *Leng May Ma*'s holding and extended Section 1253(h) far beyond exclusion proceedings to encompass any encounter by U.S. officials with refugees anywhere in the world. The fact that the legislative history specifically discusses the former but makes no mention of the latter cuts strongly against respondents' contention that the 1980 amendments were intended to have the latter, quite startling result. The fact that Congress did not act for 22 years indicates that Congress saw no inconsistency between Section 1253(h) as it then stood and the international obligations the United States assumed when it acceded to Article 33 in 1968. And the fact that Congress might have chosen other language to accomplish the same result scarcely undermines our interpretation of the amendments it did enact.

¹² See H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, *supra*, at 17-18, 30; S. Rep. No. 256, *supra*, at 17.

¹³ Although amici Members of Congress offer an extensive discussion of the legislative history of the Refugee Act of 1980, they likewise identify nothing that either rebuts our submission concerning the effect of the amendments to Section 1253(h) or supports respondents' submission that Section 1253(h), as amended, now is world-wide in scope. See Amici Br. 11-14, 25-30 (discussing Section 1253(h)). The excerpts they cite that directly pertain to Section 1253(h) for the most part refer to it as providing for withholding of "deportation," which does not include repatriation

B. *Article 33*. In an effort to buttress their position that Section 1253(h) should be given extraterritorial effect, respondents fall back on Article 33 of the U.N. Convention. See Resp. Br. 13-16, 19-23, 25-30. Article 33, like Section 1253(h), however, does not impose obligations on a Contracting State with respect to aliens outside its own territory.¹⁴

of aliens who are already outside the United States. See Amici Br. 11-12 & nn.21, 22 (citing H.R. Conf. Rep. No. 781, *supra*, at 20; H.R. Rep. No. 608, *supra*, at 18; 126 Cong. Rec. 4500 (1980) (Rep. Holtzman); 125 Cong. Rec. 35,814-35,815 (1979) (Rep. Holtzman)). The remainder of the amici brief has no bearing on the interpretation of Section 1253(h). See Amici Br. 14-24 (discussing 8 U.S.C. 1157 (refugee admissions) and 1158 (asylum)).

Although amici Members of Congress assert (Br. 25-27), without support, that the legislative history does not support our submission that Congress amended Section 1253(h) in 1980 only to extend withholding of deportation relief to exclusion proceedings, one of the authors of their brief agreed with our position in an article that amici repeatedly cite. See D. Anker & M. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 40 & n.144 (1981) (discussing *Leng May Ma* and describing revision of Section 1253(h) to extend it to exclusion proceedings as an "obvious response" to more recent litigation challenging the continued unavailability of Section 1253(h) and asylum procedures in exclusion cases, citing *Matter of Pierre*, 14 I. & N. Dec. 467 (1973), *aff'd*, 547 F.2d 1281 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977)). See also 19 San Diego L. Rev. at 45 (quoting amended language and stating: "Thus, the protections of this section were extended to apply in exclusion as well as deportation proceedings"). That likewise was the contemporaneous construction of the amendments by other commentators and by INS itself. See Gov't Br. 53-54 n.43.

¹⁴ Respondents go so far as to argue (Br. 36-39) that Section 1253(h) should be construed in the manner they urge so as not to "violate" international law, as embodied in Article 33. As we explain in our opening brief and below, our construction is fully consistent with Article 33, which likewise does not apply outside the territory of the Contracting State. But even if our understanding of the geographical scope of Article 33 were wrong, it would not follow that Section 1253(h) must also apply outside the United States. Section 1253(h) is designed to embody the principle of Article 33 in our domestic immigration laws, insofar as those laws establish procedures for adjudicating claims of aliens who have

1. *Text of the Convention*. Respondents' contention (Br. 13-16) that their interpretation is compelled by the text of Article 33 is without merit. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of, *inter alia*, his political opinion. J.A. 400. As they do with respect to Section 1253(h), respondents characterize this language as sweeping and all-inclusive, and therefore as applicable even to refugees outside the territory of the Contracting State. But nothing in Article 33 specifically so provides. Rather, like Section 1253(h), Article 33 only prohibits removal of a refugee *from* the territory of the Contracting State *to* a foreign territory where he would be threatened with persecution. This territorial premise is made explicit in paragraph 2 of Article 33, which states that the benefit of Article 33 may not be claimed by a refugee who is a danger to the security of "the country in which he is." J.A. 400. That phrase—the only territorial reference in Article 33—presupposes that the refugee who would otherwise benefit from paragraph 1 is already "in" a "country" of refuge.

In arguing that Article 33 nevertheless imposes obligations on a Contracting State throughout the world, respondents rely almost exclusively on the inclusion of the French word "refouler" in paragraph 1. Respondents assert (Br. 14) that the ordinary meaning of "refouler" is "return," and they note that the word is defined in *Dictionnaire Larousse (Francais, Anglais)* 631 (1981) as "to stem," "to repulse," or "[t]o drive back." At the

arrived in our territory and are subject to deportation or exclusion from the United States. Even if Article 33 applies to aliens beyond our borders, it would in no sense "violate" international law if Section 1253(h) were nonetheless limited to the deportation and exclusion context in which it was intended to apply. The result would be that other U.S. officials would be left to conform their conduct to Article 33 on the high seas and elsewhere outside the United States to the extent that other relevant statutes allowed them to do so. Compare *Stevic*, 467 U.S. at 429 n.22.

same time, respondents take issue (Br. 15) with the definition of "refouler" cited in our opening brief: "to expel (aliens)." See Gov't Br. 39 (quoting *Cassell's French Dictionary* 627 (1978)). Respondents do not dispute that the meaning we proffer (unlike the general definition on which they rely) is specifically relevant to the subject matter of this case and connotes the ejection of an alien from within the country's borders. But they reject our interpretation out of a belief that it would render the term "return ('refouler')" redundant by in effect causing Article 33.1 to forbid a Contracting State to "expel or expel" an alien. See Resp. Br. 15. Respondents are wrong for numerous reasons.

As the court of appeals pointed out, "expulsion" in this context typically connotes the "formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom." Pet. App. 29a (quoting G. Goodwin-Gill, *The Refugee in International Law* 69 (1983)). The Convention itself uses the term in that special sense in Article 32.1, which provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." J.A. 399. Read in this way, "expel" does not reach all classes of aliens present in a country. Accordingly, the term following "expel" in Article 33.1—"return ('refouler')"—rounds out the prohibition by ensuring that aliens whose presence in the country is unlawful are covered. The phrase "in any manner whatsoever" makes clear that the prohibition applies regardless of the means used to remove refugees from a country (e.g., summary reconduction to the border, as distinguished from the formal process of expulsion). It follows that there is no redundancy if, as we submit, "return ('refouler')" shares with "expel" the more general connotation of ejecting an alien from the country. The court of appeals in fact agreed that these two terms have different meanings in this setting. See Pet. App. 29a.¹⁵

¹⁵ By contrast, as the court of appeals also acknowledged (Pet. App. 29a), respondents' contention that the word "return" in Arti-

Indeed, respondents ignore a substantial body of authority for the proposition that the words "refouler" and "refoulement" have meanings other than "repulse" or "drive back" in this setting—meanings that directly support our interpretation of Article 33.1 and that refute respondents' submission that the text of that Article unambiguously gives it extraterritorial application. Thus, in a legal context, "refouler" means "expelling an undesirable foreigner," T. Quemner, *Dictionnaire juridique: Francais-Anglais* 214 (1974), and "refoulement" means "the return of a person who has entered a country illegally to the border; a less formal procedure than expulsion or deportation." J. Fox, *Dictionary of International & Comparative Law* 372 (1992). The latter work cites a French judicial decision that was contemporaneous to the drafting of the U.N. Convention, *In re Woudstra*, 18 I.L.R. 301 (Ct. App. of Amiens 1951). There, the court noted that a card issued to the alien certifying that he had applied for a residency permit was withdrawn and that "he was invited, by a prefectural decree of 'refoulement', to leave the country." 18 I.L.R. 301. The alien subsequently reentered France and was charged under a criminal statute applicable to aliens "who had been expelled," but the court held that he must be acquitted, observing, *inter alia*, that "[a] decree of 'refoulement' is not the same thing as an expulsion decree." *Ibid.*¹⁶ The same distinction is made

cle 33 comprehensively encompasses the repatriation of any refugee anywhere in the world to a country where he would be threatened with persecution would render superfluous the prohibition against "expelling" an alien to such a country, since that method of repatriation would be subsumed in the all-encompassing prohibition against "return."

¹⁶ The French Conseil d'Etat, the country's highest administrative court, has often considered challenges by foreigners to orders of refoulement which require them to leave French territory. See, e.g., *M. Teixeira (Antonio)*, No. 12.697 (Conseil d'Etat Oct. 12, 1979); *M. Likound*, No. 12.049 (Conseil d'Etat July 27, 1979); *M. Okeke (Josephat)*, No. 14.184 (Conseil d'Etat June 1, 1979); see also *Ministre de l'Interieur c/ M. Benini*, No. 16.562 (Conseil d'Etat Oct. 3, 1979) (rejecting request by the Minister of the Interior to

in French treatises. See H. Batiffol, *Traité Élémentaire de Droit International Privé* § 166 (3d ed. 1959); N. Guimezanes, *Le droit des étrangers: l'entrée et le séjour* 107 (1987).

Finally, respondents' interpretation of "refouler" in Article 33.1 to mean "repel" or "drive back" would have the consequence of prohibiting a Contracting State from turning back from its borders a massive movement of aliens claiming to be refugees, where to do so would leave them in the hands of the persecuting State. The only alternative would be for the Contracting State to admit the aliens into its territory. That result would be flatly inconsistent with the decision by the drafters of the Convention *not* to impose an obligation on a Contracting State to grant asylum or to tolerate a massive influx of refugees. See pages 23-25, *infra*; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Respondents concede (Br. 26) that Article 33 does not compel a Contracting State to admit refugees, but they do not explain how that concession can be squared with their interpretation of the Article (based on a general French definition of "refoulement") that would bar a Contracting State from repelling refugees if it borders on the State of persecution.

2. *Negotiating History.* Any remaining doubt about the scope of Article 33 is dispelled by its background and negotiating history. Significantly, a report published by the United Nations in 1949 in anticipation of drafting the Convention used "expulsion" to mean "the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country"; at the same time it used "reconduction" (which it regarded as the equivalent of "refoulement") to mean "the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein," but *not* "to signify the act of preventing a foreigner who has presented himself at the frontier from

annul the decision of a lower tribunal blocking the refoulement of a resident foreigner). (Conseil d'Etat decisions are available on Lexis, International Law Library, FRPBCS file.)

entering the national territory." U.N. Dep't of Social Affairs, *A Study of Statelessness* 60 & n.1 (1949); see Gov't Br. 43-44 n.31. This usage parallels that in the French authorities discussed above and supplies a firm grounding in the genesis of Article 33 for construing its text in the manner we urge.

The same understanding is reflected in the discussions of the Conference of Plenipotentiaries who finalized and adopted Article 33 in July 1951, and who specifically agreed that it would impose obligations on a Contracting State only with respect to aliens who had entered its territory. See Gov't Br. 42-43; J.A. 224-230. Respondents try (Br. 25-26, 28) to brush aside the consensus reached by the Conference by labeling it a "snippet" of negotiating history consisting of statements by only two delegates. Yet in the same breath, respondents place heavy reliance on a statement made more than a year earlier by a single representative, Louis Henkin of the United States, at a preliminary drafting session of the Ad Hoc Committee on Statelessness and Related Problems. There, Mr. Henkin expressed the view that it did not follow from the Ad Hoc Committee's deletion of a provision requiring the granting of admission and asylum that the Convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties, because "[n]o consideration of public order should be allowed to overrule that guarantee." U.N. Doc. E/AC.32/SR.20, at 11-12 (Feb. 1, 1950) (quoted at Resp. Br. 26-27). Not content to rely solely on Mr. Henkin's statement of his views in 1950 of what the Convention should contain, however, respondents seek to embellish on it by taking the extraordinary step of appending to their brief an affidavit of now-Professor Henkin—dated December 15, 1992, and submitted for the first time in this case—stating his recollection of what transpired before the Ad Hoc Committee more than 42 years ago. The Court should neither accept nor attach any weight to such an evidentiary submission.

In any event, the complete answer to Professor Henkin's statement of 42 years ago and his statement of last month is that he did not represent the United States at the Conference of Plenipotentiaries. The U.S. delegate, George Warren, did not advance—and the Conference did not adopt—Professor Henkin's vision of what the Refugee Convention should embody. Article 33 was considered at two sessions of the Conference, on July 11 and July 25, 1951. At the first session, the Swiss delegate stated his government's position that "the term 'expulsion' applied to a refugee who had already been admitted to the territory of a country," while "[t]he term 'refoulement', on the other hand, had a vaguer meaning," although "it could not * * * be applied to a refugee who had not yet entered the territory of a country." J.A. 224. In his view, "[t]he word 'return', used in the English text, gave that idea exactly." *Ibid.* The French delegate "agreed with the views expressed by the representative of Switzerland," stating that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." J.A. 225.¹⁷ The delegates of the Netherlands, Italy, Sweden, Germany, and Belgium also expressed their agreement. J.A. 225-227.

At the session on July 25, the Dutch delegate recalled the Swiss delegate's interpretation at the prior session, noted that other delegates had supported the Swiss inter-

¹⁷ This concurrence by the French delegate at the Conference of Plenipotentiaries sufficiently answers the reliance by the U.N. High Commissioner for Refugees (UNHCR) on the description more than a year earlier in reply to a question by the French member of the Ad Hoc Committee that "[i]n France and Belgium * * * *refoulement* * * * meant either deportation as a police measure or non-admittance at the frontier." UNHCR Amicus Br. 9 (quoting U.N. Doc. E/AC.32/SR.21, at 4-5 (1950)). Moreover, the discussion in the Ad Hoc Committee cited by the UNHCR indicates that although the term "refoulement" could be used in a broader sense to include nonadmittance at the frontier, in the particular context then before the Committee it referred to an alternative to expulsion as a means of removing an alien from within the country's territory. See U.N. Doc., at 5 (statement by U.K. member that U.K. practice contains no concept akin to "refoulement"); *id.* at 6 (Mr. Henkin) ("in the English text the word 'expelled' covered all cases").

pretation at that session, and reported that "[f]rom conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation." J.A. 229. "In order to dispel any possible ambiguity and to reassure his Government," the Dutch delegate asked to "have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33." *Ibid.* Without objection, the President of the Conference ruled that "the interpretation given by the Netherlands representative should be placed on record." *Ibid.* This record thus shows a consensus among *all* the delegates (which included Mr. Warren of the United States) in support of the Dutch delegate's interpretation that both "expel" and "return ('refoulement')" have in mind refugees who have entered the territory of the Contracting State. *Ibid.*¹⁸

Respondents' only answer is that the Conference must have meant to approve only the Dutch delegate's understanding that a Contracting State would have no obligation to accept a mass migration of refugees across its borders, not the specific meaning he attached to the terms in the text of Article 33.1. See Resp. Br. 27, 28, 29. But that ignores the rationale of the Dutch delegate's conclusion—that there would be no obligation to accept a

¹⁸ Respondents assert (Br. 28-29), without citation to any authority except Professor Henkin's undocumented affidavit 42 years later, that the views he expressed in the Ad Hoc Committee, "not those of the Dutch and Swiss delegates" in the Conference of Plenipotentiaries, "represented the official position of the United States government" at the Conference. That assertion cannot be squared with the decision by the U.S. delegate at the Conference (Mr. Warren) not to object to the interpretation by the Dutch and Swiss delegates, on which a "consensus" had since been reached. By contrast, Professor Henkin's affidavit addresses only the earlier work of the Ad Hoc Committee and his understanding of what that Committee intended. He does not claim any first-hand knowledge or recollection of what later transpired at the Conference. In any event, it is the position ultimately adopted by the Conference, not the position of the United States during negotiations, that controls.

mass migration *because* he and the other delegates agreed with the Swiss delegate's underlying interpretation of both "expel" and "return ('refouler') as applying only to aliens who had already entered the territory of the Contracting State.

3. *Subsequent Interpretation.* The limited territorial reach of Article 33 that is embodied in the text and background of the Convention is confirmed by commentary contemporaneous to adoption of the Convention¹⁹ and by subsequent events. The United States acceded to Article 33 in 1968 based upon its understanding that existing domestic immigration legislation already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253(h). See *Stevic*, 467 U.S. at 416-418. Significantly, as respondents concede (Br. 29 n.51), by virtue of *Leng May Ma*, Section 1253(h) did not then even apply to aliens who were physically present in the United States but subject to exclusion proceedings. See *Stevic*, 467 U.S. at 415. *A fortiori*, Article 33, as ratified by the United States, did not apply to aliens entirely outside the United States. See Gov't Br. 45-46; see also 37 Fed. Reg. 3447-3448 (1972) (discussed at Gov't Br. 48-49).²⁰

¹⁹ See Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 160-163 (1953) (discussing background and negotiating history); Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 Brit. Y.B. Int'l L. 6, 478, 482-483 (discussing negotiating history); Paul Weis (Legal Adviser, UNHCR), *The International Protection of Refugees*, 48 Am. J. Int'l L. 193, 198 (1954) (principle that refugees should not be expelled or returned to country where they would be threatened with persecution "applies equally to persons whose residence in the territory has been authorized, and to illegal entrants").

²⁰ Respondents argue (Br. 29 n.51) that the express limitation of Section 1253(h) as it then read to aliens "within the United States" "hardly proves that Article 33's territorial scope automatically shrunk to match [Section 1253(h)'s]." The point, however, is that the President and the Senate believed in 1968 that Section 1253(h) already afforded all the protection required by Article

Similarly, when Congress amended Section 1253(h) in 1980 to conform its language to Article 33, it again understood that the Protocol (and therefore the Convention) was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states.*" H.R. Rep. No. 608, *supra*, at 17 (emphasis added). Respondents try to discount this statement on the ground that the report referred to both asylum (which was admittedly territorial) as well as withholding of deportation and exclusion. The difficulty with this explanation is that the quoted phrase was followed immediately by a discussion of Article 33's prohibition against expelling or returning a refugee, thereby linking that prohibition to the territorial limitation. The same view of the prohibition's reach was repeatedly reflected in international efforts, joined by the State Department, to draft a convention on territorial asylum that would have extended relief beyond that afforded by the principle barring expulsion or return of a refugee from a country of refuge to another country where he would be threatened with persecution. See Gov't Br. 47-48. Although respondents claim that those efforts are irrelevant because they reflect various nations' reluctance to accept a mandatory duty to grant asylum (see Resp. Br. 28 n.48), respondents ignore the fact that those efforts built upon the underlying premise that Article 33.1 has a limited territorial reach.²¹

Respondents' discussion of the United States' interpretation of Article 33 essentially ignores this pattern of consistent interpretation over periods of years and focuses narrowly on the brief period around 1981 when it apparently was assumed that Article 33 did apply to aliens

33—i.e., that the territorial scope of Article 33 was no broader than that of Section 1253(h), which applied only to aliens "within the United States."

²¹ The reliance by amicus UNHCR (Br. 14-15) on a statement by the U.S. ambassador to the United Nations in 1974 ignores the fact that he did not address (much less endorse) the position that refoulement as used in Article 33 applies to repatriation resulting from a State's contact with aliens outside its borders.

outside the United States. See Resp. Br. 30-31. As we have explained (Gov't Br. 49-50 n.40), this assumption was not accompanied by a searching analysis of the Convention's text, structure, and negotiating history, and it was soon discredited when the United States returned to its prior position in the *Gracey* litigation. Thereafter, in 1989, the United States forcefully reaffirmed that position at a meeting of the Executive Committee of the UNHCR, where its representative stated that Article 33 "pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination." *Summary Record of the 442nd Meeting* at 16 (¶ 82), U.N. Doc. A/AC.96/SR.442 (1989). No party to the Convention expressed disagreement—a fact that cannot be reconciled with the position of amicus UNHCR (Br. 16-21) that respondents' expansive, world-wide concept of "refoulement" is the accepted view among nations.²² Now, respondents

²² Amicus UNHCR cites (Br. 17-18) the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, and the 1984 Cartagena Declaration on Refugees (Cartagena de Indias, Nov. 22, 1984), but neglects to mention that the U.S. is a party to neither. The UNHCR also relies (Br. 20 & n.38) on conclusions of her Executive Committee concerning protection for asylum-seekers at sea. But although the UNHCR asserts that those conclusions "recognize that the bedrock protections of Article 33 extend to international waters, and thus beyond the borders of any particular State" (Br. 20), there is nothing in the conclusions that links them to Article 33. Rather, they are, as the UNHCR calls them, "guidelines" that reflect a broader concern for asylum-seekers. The remaining Executive Committee conclusions cited by the UNHCR (Br. 20 n.39) for the most part are endorsements of the general "principle" of nonrefoulement and shed no light on the issue here. Moreover, the UNHCR has acknowledged elsewhere that such conclusions have no legal effect. See *Summary Record of the 431st Meeting* at 12 (¶ 63), U.N. Doc. A/AC.96/SR.431 (1988) (statement of Mr. Arnaout, Dir., Division of Refugee Law and Doctrine, UNHCR). Rather, they are essentially normative and have a "relatively low status" as nonlegal instruments. Jerzy Sztucki, *The Conclusions on the International*

would have this Court direct a change in the Executive Branch's interpretation when neither respondents nor their amici have cited a single instance in which another Contracting State has taken the position that Article 33 applies in circumstances such as those presented in this case.²³

IV. As respondents point out (Br. 11 n.14), because the court of appeals held that the policy of direct repatriation pursuant to Executive Order No. 12,807 violates Section 1253(h), it did not reach the questions whether the Order should be invalidated under Article 33 of the Convention or the 1981 Agreement between the United States and Haiti, or on equal protection grounds. See Pet. App. 39a. Respondents correctly identify these as alternative grounds for affirmance; but instead of devoting any of the 65 pages they have been allowed to those issues, they incorporate by reference arguments made on each issue by amici. Having done that, however, respondents state that if the Court should reverse the Second Circuit's ruling that Section 1253(h) applies outside the United States, it should remand to the Second Circuit to consider the alternative arguments. See Resp. Br. 11 n.14. These remaining arguments for invalidating the President's policy are, however, without merit.

Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, 1 Int'l J. Refugee L. 285, 307-311 (1989).

²³ The discussion of the practice of 16 nations in the brief of amicus Association of the Bar of the City of New York (at 14-17) likewise fails to support respondents' position. Half of the laws amicus reproduces that bar expulsion or return do not even state that they apply to aliens who are not already within the territory of the country. See Br. App. (laws of Bolivia, Burundi, Dominican Republic, Malawi, Nicaragua, Peru, Spain, and Switzerland). The laws of the other countries for the most part state that no person will be refused entry or subjected to similar measures if as a result he will be returned to a country where he is threatened with persecution. Even those laws, however, contain no suggestion that the government involved believed that the measure was compelled by Article 33. Compare *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2195-2196 (1992).

The 1981 Agreement with Haiti confers no private rights on interdictees that are enforceable in U.S. courts. That document is essentially a law enforcement agreement between two governments. The portion on which respondents rely (Br. 31, 40) can only reasonably be construed to put the Government of Haiti on notice of the U.S. Government's then-present intention not to repatriate refugees (see J.A. 382); it accordingly was inserted to serve the purposes of the U.S. Government, not the Haitian Government or its nationals. Similarly, respondents have no equal protection claim under the Due Process Clause because that Clause is inapplicable in this setting (see 92-528 Pet. 15-18), because immigration distinctions based on an alien's nationality do not constitute discrimination based on national origin, cf. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), because distinctions among foreign nations is common in foreign relations, and because the interdiction and repatriation program addresses a life-threatening crisis concerning Haitian migrants. Finally, the court of appeals, in conformity with the views of every other court of appeals to have considered the question, has *already* held in this very case that Article 33 creates no private, judicially enforceable rights, independent of whatever rights are conferred by the INA. See Pet. App. 110a n.13; Gov't Br. 38 n.24; 92-6144 C.A. Br. 31-37.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded with instructions to dismiss the relevant counts of the complaint.

Respectfully submitted.

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Solicitor General

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